

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of )  
READING BROADCASTING, INC. )  
For Renewal of License of )  
Station WTVE (TV), Channel 51 )  
Reading, Pennsylvania )  
and )  
ADAMS COMMUNICATIONS CORPORATION )  
For Construction Permit for a New )  
Television Station to Operate on )  
Channel 51, Reading, Pennsylvania )

MM Docket No. 99-153

File No. BRCT-940407KF

**RECEIVED**

AUG 16 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

File No. BPCT-940630KG

To: Magalie Roman Salas, Secretary  
for direction to  
The Honorable Richard L. Sippel  
Administrative Law Judge

OPPOSITION OF ADAMS COMMUNICATIONS CORPORATION  
TO MOTION TO ENLARGE ISSUES

1. Adams Communications Corporation ("Adams") hereby opposes the Motion to Enlarge Issues as filed and supplemented by Reading Broadcasting, Inc. ("RBI"). In its Motion, RBI seeks addition of a "specialized programming" issue. Such action, however, would stand long-established, consistent Commission policy totally on its head and is not supported by the precedent cited by RBI or any Commission or Court precedent.

Timeliness

2. Initially, as even RBI acknowledges, its Motion is late. RBI has known for more than five years that it would be facing a comparative renewal proceeding, and it therefore had

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ample time to prepare its Motion. Yet, RBI offers no explanation or justification for its lateness. The only basis for a waiver of the deadline is the self-serving and conclusory notion that the requested issue may be of decisional significance and public interest importance. Motion at 2. However, as demonstrated below, the requested issue will not be a matter of decisional significance here, regardless of whatever its public interest importance might be. Accordingly, the lateness of RBI's Motion cannot be excused on that ground, and the Motion must be dismissed.

#### Discussion

3. As a preliminary matter, it is important to separate out two completely distinct elements which RBI attempts to blur together. First, to the extent that an incumbent's actual programming record may be relevant to a comparative renewal proceeding, such "past broadcast record" analysis involves an historical, retrospective analysis of the incumbent's performance relative to any claim for a renewal expectancy preference. In this case, the Presiding Judge has concluded that the relevant license term here extended from August 1, 1989 to August 1, 1994. Memorandum Opinion and Order, FCC 99M-47, released August 9, 1999. So any consideration of RBI's past programming must be limited to programming it broadcast during that license term.

4. Second, a party which advances a timely proposal to provide, in the future, some kind of "specialized programming" may be entitled to addition of an issue concerning the

comparative need for such "specialized programming" if the competing applicant does not propose essentially the same kind of "specialized programming". Any such "specialized programming" issue involves only an assessment of the relative need for the different kinds of programming which have been prospectively proposed by the competing applicants -- the programming which the incumbent has historically aired is completely immaterial to such an issue. <sup>1/</sup>

5. But in its Motion, RBI relies exclusively on programming which it claims to have broadcast since June, 1998 to justify addition of a "specialized programming" issue. See Motion at 3-7. Even if all the factual statements in the Motion were deemed for the sake of argument to be completely accurate, those statements would be immaterial here under any circumstance: the programming in question post-dates the relevant license term, and is therefore irrelevant to any claim of "renewal expectancy"; and any retrospective consideration of past programming is immaterial to any consideration of any "specialized programming" proposal which the applicant could have made (but did not make).

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<sup>1/</sup> For example, in the one comparative renewal case cited by RBI -- Broadcast Communications, Inc., 93 FCC2d 1176 (ALJ 1982), 93 FCC2d 1162, 53 RR2d 805 (Rev. Bd. 1983), 97 FCC2d 61, 55 RR2d 997 (1984) -- all decision-makers clearly segregated their discussions of past broadcast record, on the one hand, and proposed "specialized programming", on the other. The only other "specialized programming" case cited by RBI -- American International Development, Inc., 75 FCC2d 67 (ALJ 1979), aff'd, 86 FCC2d 808, 49 RR2d 1029 (Rev. Bd. 1981) -- involved competing applications for a new authorization. No renewal applicant was involved therein, and therefore there was no issue concerning any claim of "specialized programming" based on past programming.

6. This latter point is crucial, as it points up the ultimate flaw in RBI's position: RBI's renewal application does not contain any proposal to continue to air Spanish-language programming. Nor, as far as Adams has been able to determine, does the RBI application, as amended, contain any representation that RBI may have been providing essentially full-time Spanish-language programming since June, 1998. In its Motion RBI attempts to distract attention from the lack of any such proposal by relying exclusively on its past programming.<sup>2/</sup> But, as discussed above, such past programming is irrelevant and immaterial here.

7. If RBI wished to claim some preference for a "specialized programming" proposal (i.e., a proposal to broadcast such programming in the future), then it should have timely advanced such a proposal in its application.<sup>3/</sup> It did not do so. It is therefore not entitled to any claim of preference now for a program service which it did not propose.

8. Two additional points warrant consideration here.

9. First, to the extent that it has now arguably advanced

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<sup>2/</sup> See RBI's Supplement to Motion to Enlarge Issues at 2 (RBI "seeks a specialized programming issue based on WTVE's Spanish-language programming beginning on June 1, 1998 . . . . [RBI] is seeking [comparative credit] in light of WTVE's programming as it existed prior to the 'B' cut-off date." (emphasis added)).

<sup>3/</sup> In Broadcast Communications, Inc. -- the only comparative renewal case cited by RBI in its Motion -- the incumbent renewal applicant had advanced such a proposal, which led to the inclusion of an appropriate issue in the Hearing Designation Order therein. See Broadcast Communications, Inc., 93 FCC2d 1176, ¶1, n. 1 (ALJ 1982) (citing 46 Fed. Reg. 22036).

a proposal to provide Spanish-language programming, RBI's "proposal" is woefully late by any measure: it arrives five years after the close of the relevant license term, five years after the filing of Adams's application, approximately three months after the "B" cut-off date herein, more than two months after the issuance of the hearing designation order herein, and even a week after the deadline for motions to enlarge issues. <sup>4/</sup> Accordingly, that "proposal" is entitled to no consideration.

10. However, if the Presiding Judge were to waive any or all of those deadlines in order to permit consideration of that "proposal", then fundamental fairness requires equivalent treatment for Adams. As set forth in the accompanying Declaration, Adams hereby advises the Presiding Judge that, in the event of a grant of its application, it proposes to provide essentially full-time Spanish-language programming comparable to that described in RBI's Motion. <sup>5/</sup> But if Adams also proposes

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<sup>4/</sup> In its Supplement, RBI asserts that the initiation of Spanish-language programming occurred 11 months after the "B" cut-off date herein, as if that made some difference. Supplement at 2. In a footnote to that assertion, RBI cites three cases -- Pleasant Hope Broadcasting Co., 6 FCC Rcd 6553 (Rev. Bd. 1991); Mableton Broadcasting Co., 5 FCC Rcd 6314 (Rev. Bd. 1990); and Alexander S. Klein, Jr., 86 FCC2d 423 (1981). None of the cited cases has any bearing here. Rather, they all relate to when certain commitments needed to be made, or underlying documentation prepared, insofar as an applicant's proposal as set out in its application as of the relevant "B" cut-off date (or other equivalent deadline) was concerned. In the instant case, RBI's application, as of the "B" cut-off date, did not include any specialized programming proposal.

<sup>5/</sup> Adams is not hereby tendering a formal "amendment" to its application because no such "amendment" has been tendered by RBI. If RBI is permitted to advance a programming "proposal" in a

(continued...)

Spanish-language programming, then there is no need for a "specialized programming" issue, as the two competing applicants here will both be proposing to serve the same perceived programming need, and neither will be entitled to any comparative preference on that basis.

11. Second, it is important to recognize the Commission's consistent and long-standing policy against consideration of upgraded programming performance by an incumbent renewal applicant after a challenge application has been filed. E.g., Comparative Hearings on Renewal Applicants, 22 FCC2d 424, 18 RR2d 1901 (1970), vacated on other grounds sub nom. Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972); Video 44, 6 FCC Rcd 4948, 69 RR2d 975 (1991); National Black Media Coalition, 775 F.2d 342 (D.C.Cir. 1985); Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 735 (D.C.Cir. 1976); Trustees of the Univ. of Pa., 69 FCC2d 1394, 1424 (1978); RKO General, Inc., 35 FCC2d 100, 103 (1972); Intercontinental Radio, Inc., 98 FCC2d 608, 618 (Rev.Bd. 1984).

12. The Court of Appeals has described the policy as follows:

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<sup>5/</sup>(...continued)

Motion to Enlarge Issues, Adams should be entitled to do the same in its responsive pleading. Adams notes that its principals have previously demonstrated a desire to provide Spanish-language programming. The majority of Adams principals were also principals of Monroe Communications Corporation (which sought a construction permit for a television station in Chicago), which planned to provide such programming. See Video 44, 6 FCC Rcd 4948, 4950, 69 RR2d 975, 979, ¶17.

The Commission's policy of making an applicant 'run on his record' is based on the sound proposition that a licensee's behavior while 'under the gun' is not especially probative of how the licensee will act when the pressure is removed, i.e., once a license is granted.... It hardly takes an expert in human behavior to understand that people and companies tend to react a bit differently when they know they are being watched and that they have much to lose if they do not act properly.

National Black Media Coalition, supra, 775 F.2d at 350, 356.

13. The Commission's application of its policy in the Video 44 case is directly on point here. The Commission concluded that an incumbent renewal applicant's programming performance during the license term did not support award of a renewal expectancy. The incumbent sought reconsideration on the basis of a proffer of extensive evidence concerning Spanish-language programming which had commenced three years after the filing of the challenge application. The incumbent argued that it had thereby provided "highly meritorious service" to the local "Hispanic community". The Commission resoundingly rejected that argument. Video 44, supra.

14. Citing two decades' worth of precedent, the Commission stated:

[The incumbent's] argument, however, is inconsistent with well established Commission policy. The Commission has long declined to give credit for a licensee's post-term upgrading. We have held that it would undermine licensee accountability to permit a licensee to evade the consequences of its deficient performance by upgrading after a challenge has been filed. [citations omitted] As we have explained:

. . . [T]he renewal applicant must run upon his past record in the last license term. If, after the competing application is filed, he upgrades his operation, no evidence of such upgrading will be accepted or may be relied upon. To give weight to such

belated efforts to meet his obligation to provide substantial service would undermine the policy of the competitive spur which Congress wisely included in the Communications Act. A renewal applicant could simply supply minimal service from year to year, secure in the knowledge that even if a competing application were filed at the time of renewal, he could then upgrade to show substantial service. . . .

. . . [T]he [incumbent's] post-term record, the merit of which we do not question, is simply irrelevant. [footnote omitted] . . . [T]he policy underlying the granting of a renewal expectancy is that, for the renewal expectancy to function as an incentive, the licensee must comply with applicable standards during the time period under review. If the licensee could escape the consequences of its failure to earn a renewal expectancy by upgrading after its performance has been challenged, the renewal expectancy determination (and, indeed, the Congressionally-mandated comparative renewal process, as interpreted by the courts) would be rendered meaningless.

6 FCC Rcd at 4950, 69 RR2d at 978-79.

15. While RBI disclaims any intent to rely on its post-license term programming record for comparative purposes, that disclaimer is belied by the fact that the sole bases offered by RBI for the addition of its requested "specialized programming" issue are claims concerning programming which post-dated the relevant license term by some three years. See Footnote 2, above. Consideration of such programming is plainly foreclosed by the administrative and judicial precedent cited above.

16. On this score, Broadcast Communications, Inc. is also clearly distinguishable. Even if that case were deemed to stand for the proposition that an incumbent renewal applicant's past programming could be considered in connection with a "specialized programming" issue -- and again, the decision-makers in that case appear to have carefully avoided any such suggestion, see



Footnote 1, above -- the incumbent in Broadcast Communications, Inc. had been providing foreign language programming for 20 years prior to the filing of the challenge application, and predominantly Spanish-language programming since at least the beginning of the license term immediately prior to the renewal application at issue in that case. See Broadcast Communications, Inc., 93 FCC2d 1162, 53 RR2d at 807, ¶2. As a result, the provision of such programming by the incumbent in that case -- programming which pre-dated the filing of the challenge application -- did not constitute a post-challenge upgrade prohibited by the policies and precedents discussed above.<sup>6/</sup>

17. Here, by contrast, RBI acknowledges that its Spanish-language broadcasts did not begin until June, 1998, some five years after the filing of Adams's application and, therefore, five years after the cut-off date for programming upgrades. In view of these circumstances, inclusion of a "specialized

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<sup>6/</sup> Adams notes that Broadcast Communications, Inc. appears to be unique in this respect. Our research of reported decisions since 1970 reveals not a single decision in which an incumbent renewal applicant has been permitted to rely on a specialized program proposal (or modified programming) where the initial broadcast of the programming sought to be relied on post-dates the license term under challenge. George E. Cameron, Jr., 71 FCC2d 460, 45 RR2d 689, ¶11 (1979), involved a comparative renewal proceeding, but the specialized programming proposal there was advanced by one of the challengers, not the incumbent. Other reported decisions involved strictly new station comparative proceedings. See, e.g., American International Development, Inc., 75 FCC2d 67 (ALJ 1979), aff'd, 86 FCC2d, 49 RR2d 1029 (1981); Advanced Broadcast Technologies, Inc., 5 FCC Rcd 1960, 67 RR2d 944 (Rev. Bd. 1990); Scott & Davis Enterprises, Inc., 75 FCC2d 721, 46 RR2d 1425 (ALJ 1980), 88 FCC2d 1090, 50 RR2d 1241 (Rev. Bd. 1982); Flint Family Radio, Inc., 69 FCC2d 48, 41 RR2d 1155 (Rev. Bd. 1977).

programming" issue would fly in the fact of well-established Commission policy and precedent, as it would suggest that an incumbent might be able to benefit from post-challenge modifications of its performance. Such an approach would improperly undermine the comparative renewal process. See Video 44, supra.

WHEREFORE, for the reasons stated, Adams Communications Corporation opposes the Motion to Enlarge Issues submitted by Reading Broadcasting, Inc.

Respectfully submitted,

  
 /s/ Gene A. Bechtel  
 Gene A. Bechtel

  
 /s/ Harry F. Cole  
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Counsel for Adams Communications  
 Corporation

August 16, 1999

**DECLARATION**

Howard N. Gilbert, under penalty of perjury, hereby declares the following to be true and correct:

1. I am an officer, director and shareholder of Adams Communications Corporation ("Adams"), an application for a construction permit for Channel 51, Reading, Pennsylvania. I am preparing this Declaration for submission to the Presiding Administrative Law Judge in MM Docket No. 99-153 in connection with Adams's Opposition to a Motion to Enlarge Issues submitted by Reading Broadcasting, Inc. ("RBI").

2. In the event of a grant of Adams's application, Adams proposes to provide essentially full-time Spanish-language programming comparable to that described in RBI's Motion.

3. Adams's principals have previously demonstrated a desire to provide Spanish-language programming. The majority of Adams's principals were also principals of Monroe Communications Corporation (which sought a construction permit for a television station in Chicago); Monroe's proposal to provide such programming are a matter of record before the Federal Communications Commission.

  
Howard N. Gilbert

Date: August 18, 1999


CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of August, 1999, I caused copies of the foregoing "Opposition of Adams Communications Corporation to Motion to Enlarge Issues" to be hand delivered (as indicated below), addressed to the following:

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